Supreme Court, U.S.
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No. 93-1015

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONNA F. CARDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's claims under the Federal Tort Claims Act (FTCA) were barred by the Secretary of Labor's determination that the claims are covered by the exclusive remedies prescribed in the Federal Employees' Compensation Act.

2. Whether, in this FTCA action, the United States was properly substituted for the individual federal defendants pursuant to 28 U.S.C. 2679(d)(1).

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unreported, but the judgment is noted at 6 F.3d 778 (Table). The opinion of the district court (Pet. App. 5a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. A petition for rehearing was denied on September 24, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on December 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed as a psychologist by the Veterans Administration (VA). In this action and several other proceedings she has alleged that from May, 1982, through May, 1988, the VA created a hostile work environment for her. Specifically, she alleges that she was improperly disciplined, threatened with dismissal, and inadequately assisted in her attempts to get training and administrative relief from the alleged harassment. She further alleges that as a result of these incidents she has suffered emotional distress. Pet. App. 6a.

1. a. Before filing this action, petitioner presented her claim of job-related emotional injury in an application for benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* On May 11, 1990, the Employees Compensation Appeals Board within the Department of Labor affirmed the decision of the Office of Workers' Compensation Programs denying her claim. 93-1106, Supp. C.A. App. 19-27. The Board stated that emotionally disabling conditions may be covered by FECA (*id.* at 25):

> When an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by the employment or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within coverage of the Act.

The Board also determined that petitioner identified several employment incidents that could cause a

"compensable emotional disabling condition." *Ibid.* The Board concluded, however, that petitioner had failed to submit medical evidence to show that her alleged emotional distress was caused by those incidents, even after she had been advised that medical evidence was necessary to support her claim. *Id.* at 27; see Pet. App. 6a-7a.

b. Prior to filing this action, petitioner also sought relief under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. Pursuant to the CSRA, after petitioner was dismissed from her job at the VA on April 8, 1988, she appealed her dismissal to the Merit Systems Protection Board (M.S.P.B.). The M.S.P.B. affirmed the agency's dismissal action, finding no grounds for petitioner's claim of harassment. *Donna F. Cardwell* v. *Veterans Administration*, No. PH07528810311 (Phila. Regional Office, M.S.P.B., Aug. 24, 1988). Petitioner sought a second review of her case, and the M.S.P.B. again affirmed the agency's dismissal action. *Donna F. Cardwell* v. *Veterans Administration*, No. PH7528810311 (M.S.P.B. Jan. 6, 1989).

2. Petitioner filed this action in the United States District Court for the Eastern District of Pennsylvania on January 7, 1992, seeking damages pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Her initial complaint named only the United States as a defendant. On February 14, 1992, however, petitioner filed an amended complaint naming several federal employees as additional defendants. The district court granted the government's motion to substitute the United States for the individual defendants pursuant to 28 U.S.C. 2679(d)(1).[1] The district court also granted

[1] Petitioner filed an interlocutory appeal from the order substituting the United States for the individual defendants, and the

petitioner's motion for leave to file a proposed amended complaint alleging jurisdiction on grounds additional to the jurisdictional provision of the FTCA (28 U.S.C. 1346(b)). However, petitioner never filed the proposed amended complaint. Pet. App. 7a.

Thereafter, the district court granted the government's motion to dismiss the action. Pet. App. 5a-15a. The court began by observing that the workers' compensation remedy provided by FECA is "exclusive" and supplants "any other claims for compensation against the government." *Id.* at 9a (citing *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983)); see 5 U.S.C. 8116(c). The court further observed that under FECA the Secretary of Labor has authority to "decide all questions arising under FECA, including those concerning the scope of coverage of FECA," and that "[t]he Secretary's decision on whether FECA covers the alleged injury is final and not reviewable by the courts." Pet. App. 9a. The district court noted that "in this case, the Secretary has taken the view that [petitioner's] claim is cognizable under the FECA." *Id.* at 11a (citing *In re Donna F. Cardwell and the Veterans Admin.*, No. 90-325 (May 11, 1990)). The court accordingly held that, because "[t]he Secretary's determination of the scope [of FECA] is binding upon this Court," petitioner's action is barred by the exclusivity provisions of FECA. Pet. App. 12a.

In the same order in which it granted the government's motion to dismiss, the district court denied petitioner's motion for leave to amend her complaint to add constitutional claims. Pet. App. 13a-14a. The court inferred from petitioner's failure to plead additional juris-

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court of appeals dismissed that appeal for lack of jurisdiction. Pet. App. 7a n.1.

dictional grounds that her constitutional claims were based solely on the FTCA. *Id.* at 13a. The court held that those claims were not cognizable under the FTCA because the FTCA "d[oes] not waive sovereign immunity from claims that the United States violated a person's constitutional rights." *Ibid.*[2]

3. The court of appeals affirmed in an unpublished judgment order. Pet. App. 3a-4a.

ARGUMENT

1. Petitioner argues (Pet. 6-20) that the courts below erred in holding that this FTCA action is barred because it is based on claims that the Secretary has determined are covered by FECA. That holding, however, is fully consistent with the language and structure of FECA and with decisions of this Court and the courts of appeals. Further review is therefore unwarranted.

a. FECA establishes a workers' compensation scheme under which federal employees and their survivors receive benefits, regardless of fault, for employment-connected injuries or death. FECA "was designed to

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[2] Petitioner filed two other actions in the Eastern District of Pennsylvania based on allegations against the VA substantially similar to those asserted here. In April, 1986, petitioner sued VA officials and the Department of Labor, claiming that her sick leave was restricted, she was admonished, and she was suspended from work because of her sex. *Donna F. Cardwell* v. *General Thomas K. Turnage, et al.*, Civ. No. 86-2226 (order dated June 25, 1987). The district court dismissed that action as "frivolous." *Ibid.* In another action filed on August 15, 1988, petitioner alleged that she was improperly threatened with dismissal, she had her sick leave restricted, she incurred an undeserved "error call," she was suspended, and she endured harassment. *Donna F. Cardwell* v. *United States, et al.*, Civ. No. 87-0962. The district court suspended that action on November 9, 1988, pending petitioner's exhaustion of her administrative remedies.

protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983). Accordingly, the text of FECA states that the liability of the United States for injuries covered by FECA "is exclusive and instead of all other liability of the United States or the instrumentality to the employee." 5 U.S.C. 8116(c).

The authority to determine whether a federal employee's injury is covered by FECA is vested in the Secretary of Labor. FECA empowers the Secretary "to decide all questions arising under" (5 U.S.C. 8145) the Act and provides that his decisions are "final and conclusive" and "not subject to review" by any court (5 U.S.C. 8128(b)). In *Southwest Marine, Inc.* v. *Gizoni*, 112 S. Ct. 486 (1991), this Court observed that "FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary's determination of FECA coverage. Consequently, the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies." *Id.* at 493 (citing 5 U.S.C. 8128(b); quoting *Lindahl* v. *OPM*, 470 U.S. 768, 780 & n.13 (1985)). Consistent with that reading of FECA, every circuit to consider the issue has held that FECA requires federal courts to dismiss or stay an FTCA action brought by an injured federal employee if the action raises a substantial question regarding FECA coverage.[3] A substantial question of coverage exists

[3] See, *e.g.*, *McDaniel* v. *United States*, 970 F.2d 194, 198 (6th Cir. 1992) (per curiam); *Bruni* v. *United States*, 964 F.2d 76, 78-79 (1st Cir. 1992); *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983); *DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982); *Wallace* v. *United States*, 669 F.2d 947, 951-952 (4th Cir. 1982); *Reep* v. *United States*, 557 F.2d 204, 207 (9th Cir. 1977); *Bailey* v.

"unless it is *certain* that the Secretary would not find coverage." *Bruni* v. *United States*, 964 F.2d 76, 79 (1st Cir. 1992).

This Court's observation in *Southwest Marine, Inc.* and the uniform holdings of the courts of appeals giving effect to the exclusivity provisions of FECA dispose of petitioner's challenge to the dismissal of her claims. As the district court observed, her claims are based exclusively on the FTCA. Pet. App. 13a; see also Pet. 2. The Secretary of Labor has determined, however, that those claims are covered by FECA. Pet. App. 11a. Because the Secretary has determined that FECA applies, "the [district] court[] ha[d] no jurisdiction over [petitioner's] FTCA claims." *Southwest Marine, Inc.*, 112 S. Ct. at 493.

b. There is no merit to petitioner's argument (Pet. 6-13) that the constitutional separation-of-powers doctrine bars Congress from authorizing the Secretary of Labor to decide whether an injury is covered by FECA, while also precluding judicial review of the Secretary's decisions. This Court has never suggested that it would be unconstitutional for Congress to preclude judicial review of nonconstitutional issues raised in administrative determinations. "'[N]either this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law * * * to be tried in an Art. III court' * * *. Instead, the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985), quoting

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United States, 451 F.2d 963, 965 (5th Cir. 1971); see also *Daniels-Lumley* v. *United States*, 306 F.2d 769, 770-771 (D.C. Cir. 1962).

Palmore v. *United States*, 411 U.S. 389, 407 (1973); see also, *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943) ("Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law").

This case does not involve the adjudication of "private rights," a matter as to which Congress's power to place adjudicative authority in non-Article III tribunals is limited. See generally *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 51-55 (1989). Instead, petitioner is asserting a right to workers' compensation, a remedy wholly of statutory origin. See *id.* at 53-54. With respect to such statutory benefits, "[t]he United States may create rights in individuals against itself and provide only an administrative remedy." *Tutun* v. *United States*, 270 U.S. 568, 576 (1926); accord *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) ("when [the United States] creates rights in individuals against itself, [it] is under no obligation to provide a remedy through the courts").

Contrary to petitioner's contention (Pet. 7-8), the decisions of the courts below do not conflict with *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), or *Stark* v. *Wickard*, 321 U.S. 288 (1944). *Marbury* v. *Madison* has not been interpreted to prevent courts from deferring to administrative interpretations of a statute when Congress has authorized the administrative body to decide such questions. See generally Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 18 (1983). Petitioner cites (Pet. 7-8) *Nierotko* and *Stark* for the proposition that an agency "may not finally decide the limits of its statutory power." The decisions of the courts below are consistent that principle. Under *Nierotko* and *Stark*, it is for the courts, not the

Secretary, to decide whether Congress authorized the Secretary to determine FECA coverage questions without judicial review.[4] The courts below—in accordance with the text of FECA and with all of the courts of appeals that have addressed the issue, see p. 6 & n.3, *supra*—decided that Congress did confer such authority on the Secretary in FECA. The separation-of-powers doctrine does not prevent courts from deferring to administrative decisions that the courts determine have been made within the scope of statutory authority.

2. In addition to challenging the decision of the courts below to defer to the Secretary's determination that petitioner's claims are covered by FECA, petitioner challenges the Secretary's determination on the merits. That challenge does not warrant further review for two reasons. First, it is foreclosed for the reasons discussed above in point 1: FECA expressly bars direct judicial review of the Secretary's decision on a claim for FECA benefits. 5 U.S.C. 8128(b), 8145. Petitioner cannot circumvent that statutory bar by seeking judicial review of the Secretary's decision in an FTCA action. In any event, petitioner's challenge is without merit.

a. Petitioner's primary argument (Pet. 13-20) is that FECA does not cover emotional injuries. The Secretary of Labor, however, has taken the contrary view,

[4] Both *Nierotko* and *Stark* involved questions of statutory interpretation. In *Nierotko*, the Court held that Congress did not delegate to the Social Security Board the authority to determine what compensation paid by employers to employees should be treated as wages under the Social Security Act. The Court noted, however, that Congress could have done so had it wished. 327 U.S. at 369. In *Stark*, the Court held that Congress did not intend to preclude judicial review of certain actions taken by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 321 U.S. at 307-310.

interpreting FECA to cover emotional injuries.[5] Even if that interpretation were subject to judicial review in this action, it would be entitled to substantial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and would have to be upheld as representing, at a minimum, a plausible reading of FECA. See 5 U.S.C. 8101(5) (defining "injury" for FECA purposes).

Moreover, the most recent decisions by the courts of appeals acknowledge, in accord with the Secretary's determination, that emotional injuries are covered by FECA. See *Figueroa* v. *United States*, 7 F.3d 1405, 1408 (9th Cir. 1993) ("FECA * * * contemplates coverage for a condition of emotional distress that *results from* the stress of being exposed in a *discrete* event to a toxic substance that could cause future physical harm."), petition for cert. pending (filed Dec. 16, 1993) (No. 93-972); *Swafford* v. *United States*, 998 F.2d 837, 840-841 & n.1 (10th Cir. 1993) (FECA covers emotional injuries arising out of sexual harassment); *McDaniel* v. *United States*, 970 F.2d 194, 197-198 (6th Cir. 1992) (FECA covers injuries caused by workplace harassment).

The only court of appeals decisions cited by petitioner (Pet. 17-20) as holding to the contrary are *DeFord* v. *Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), *Sheehan*

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[5] See, *e.g.*, *In re Lillian Cutler & Dep't of Labor*, 28 Empl. Comp. App. Bd. 125, 129-130 (1976):

> Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment.

v. *United States*, 896 F.2d 1168, modified, 917 F.2d 424 (9th Cir. 1990), and *Heilman* v. *United States*, 731 F.2d 1104 (3d Cir. 1984). The Third Circuit's decision in *Heilman*, however, actually *supports* the decisions below.[6] The Sixth Circuit and the Ninth Circuit have issued decisions subsequent to *DeFord* and *Sheehan* that make it unnecessary for this Court to resolve any arguable conflict between those two decisions and the decisions below.

In *DeFord*, the Sixth Circuit held that the plaintiff was not barred by FECA from recovering compensatory damages authorized under the Energy Reorganization Act of 1974, 42 U.S.C. 5851, for unlawful discrimination. 700 F.2d at 290-291. Although that holding is plainly inapposite here, the court suggested, in dictum that arguably conflicts with the decisions below, that FECA does not cover claims for "discrimination, *mental distress*, or loss of employment." *Id.* at 290 (emphasis added). In two later decisions, however, the Sixth Circuit has viewed as binding the Secretary's determination that emotional injuries may be covered by FECA, whether or not compensation is actually available for the injury claimed. *McDaniel* v. *United States*, 970 F.2d at 197-198; *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991).

In *Sheehan*, the Ninth Circuit held that the plaintiff's FTCA action for emotional distress caused by workplace sexual harassment was not barred by the Secretary's

[6] The plaintiff in *Heilman* alleged that he suffered injuries from exposure to radiation both as a military service member and as a federal civilian employee. The Third Circuit held that the injuries the plaintiff allegedly suffered as a civilian employee plainly were covered by FECA and thus could not provide the basis for an FTCA action. 731 F.2d at 1110-1111.

determination that emotional injuries are covered by FECA. 896 F.2d at 1174. In its later decision in *Figueroa*, 7 F.3d at 1408, however, the Ninth Circuit read *Sheehan* narrowly to "stand[] only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment." The *Figueroa* court emphasized that it "d[id] not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary." *Ibid.* The court in *Figueroa* held that the plaintiff's FTCA claim for emotional distress was barred by FECA, because "[a]rguably, mental distress is a form of stress" covered by FECA. *Ibid.* In so holding, the court relied in part on the fact that "the Department of Labor has determined that emotional distress may be considered a disability" covered by the Act. *Ibid.*

In light of *Figueroa*, any conflict between *Sheehan* and the decisions below does not warrant further review at this time.[7] *Sheehan* suggested that courts should independently determine whether an injury is covered by FECA and that emotional injuries are not covered under that Act. *Figueroa*, however, creates considerable uncertainty about the Ninth Circuit's position on both scores, since it reaffirms the "general rule" that questions of FECA coverage should be decided by the Secretary, and it gives weight to the Secretary's determination that emotional injuries are covered. It is thus far from clear that the Ninth Circuit would have entertained

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[7] The government has taken the position that *Sheehan* was wrongly decided, but for reasons discussed in the text, further review is unwarranted in this case without regard to the merits of *Sheehan*.

petitioner's FTCA claims, given the Secretary's determination that her claims are covered by FECA.[8]

b. Petitioner also argues (Pet. 8) that FECA does not cover her alleged injuries because, she claims, they stem from intentional, as distinguished from negligent, conduct. FECA, however, is an employee's exclusive remedy for "injury or death," 5 U.S.C. 8116(c); it makes no exception for injuries that are intentionally inflicted.[9] Consistent with FECA's plain language, courts have uniformly held that "FECA covers liability created both by negligent *and intentional* acts on the part of the Government." *Green* v. *Hill*, 954 F.2d 694, 697 (11th Cir. 1992) (emphasis added). Accord *Heilman* v. *United States*, 731 F.2d 1104, 1111 n.6 (3d Cir. 1984); *Metz* v. *United States*, 723 F. Supp. 1133, 1135-1137 (D. Md. 1989);

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[8] Further review is unwarranted for the additional reason that, even if petitioner's claims were not barred by FECA, they would be barred on other grounds. Substantially all of petitioner's claims are based on personnel actions (*e.g.*, reduction in performance ratings) for which the CSRA provides the exclusive remedies. See, *e.g.*, *Gergick* v. *Johnson*, 997 F.2d 1237 (8th Cir. 1993) (CSRA barred FTCA claim for intentional infliction of emotional distress caused by workplace harassment), petition for cert. pending, No. 93-959; *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991); *Rollins* v. *Marsh*, 937 F.2d 134, 139-140 (5th Cir. 1991); *Saul* v. *United States*, 928 F.2d 829, 840-841 (9th Cir. 1991); cf. *United States* v. *Fausto*, 484 U.S. 439 (1988) (CSRA precludes suit under Tucker Act, 28 U.S.C. 1491, to obtain judicial review of an adverse personnel action); *Bush* v. *Lucas*, 462 U.S. 367 (1983) (CSRA preempts *Bivens* action for matters arising out of the employment relationship).

[9] FECA does exempt from compensation those injuries caused by (1) the injured employee's own willful misconduct, (2) his intent to injure himself, or (3) his intoxication. See 5 U.S.C. 8102(a)(1)-(3). Section 8102(a) establishes no similar exception for injuries intentionally inflicted upon a worker by a government agent.

Burke v. *United States*, 644 F. Supp. 566, 569 (E.D. La. 1986). Petitioner cites no authority to the contrary.

3. Petitioner contends (Pet. 21-30) that the district court erred in granting the government's motion to substitute the United States for the individual federal defendants under 28 U.S.C. 2679(d)(1). That contention is incorrect.

Section 2679(d)(1) of Title 28 provides, in pertinent part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the [FTCA] * * *, and the United States shall be substituted as the party defendant.

Section 2679(d)(1) thus makes it clear that the district court is required to substitute the United States for individual defendant employees if the Attorney General has certified that the employees were acting within the scope of their office or employment when they engaged in the conduct upon which petitioner's claims are based.

Section 2679(d)(1) fully applies here. The Attorney General certified that the individual defendants named in petitioner's amended complaint were acting within the scope of their employment in this case. The determination underlying the Attorney General's certification is not open to serious challenge. Petitioner alleged that the individual defendants improperly disciplined her, threatened her with dismissal, and inadequately assisted her in her attempts to get training and administrative relief from harassment. Those allegations relate to

supervisory and management actions that the defendants took in furtherance of their employment duties.

Petitioner errs in contending (Pet. 21) that the individual defendants could not have acted within the scope of their employment because they committed intentional torts. The question whether the defendants were acting within the scope of their employment for purposes of Section 2679(b)(1) is governed by the law of Pennsylvania, where the alleged conduct occurred. *Aliota* v. *Graham*, 984 F.2d 1350, 1358 (3d Cir. 1993). Pennsylvania has rejected the notion that an employee's intentionally wrongful acts cannot be within the scope of his or her employment. See, *e.g.*, *Butler* v. *Flo-Ron Vending Co.*, 557 A.2d 730, 736 (Pa. Super. Ct. 1989); see also *Johnson* v. *Carter*, 983 F.2d 1316, 1322-1324 (4th Cir. 1993) (FTCA claims of slander and libel were within scope of employment under Virginia law).[10]

[10] Similarly, prior to enactment of the Federal Employees Liability Reform Tort and Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, this Court rejected the notion that a wrongful purpose underlying the federal employee's action would defeat the absolute immunity accorded to federal employees under certain circumstances. *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion); see also *Arajuo* v. *Welsh*, 742 F.2d 802, 804 (3d Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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